

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

LUIS COTTO,)
Petitioner,) Case No. 1:09-cv-168-SJM-SPB
v.)
FRANK J. TENNIS, *et al.*,)
Respondents.)

MEMORANDUM ORDER

Petitioner Luis Cotto commenced the instant action by filing a petition for writ of habeas corpus, which was received by the Clerk of Court on July 8, 2009 and referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates.

On October 9, 2009, this Court entered an order [7] denying Cotto's motion for leave to proceed *in forma pauperis*.¹ By per curiam opinion filed March 4, 2010 and entered on this Court's docket on March 26, 2010 [14], the Third Circuit Court of Appeals affirmed this Court's October 9, 2009 Order denying Cotto *in forma pauperis* status.

¹ The Magistrate Judge's Report and Recommendation recommended that Cotto's IFP motion be denied because his prison account statement showed an average monthly balance that exceeded the modest \$5.00 filing fee. Cotto objected to this recommendation on the sole ground that the Magistrate Judge had wrongly identified the institution in which he is incarcerated; he did not otherwise challenge the Magistrate Judge's assessment of his prison account statement. This Court overruled Cotto's objection and adopted the Magistrate Judge's Report and Recommendation.

No further activity is reflect on the docket until September 3, 2010, when Magistrate Judge Baxter entered an order [15] directing Cotto, before September 22, 2010, to pay the \$5.00 filing fee or face dismissal of his petition for failure to prosecute.² On December 6, 2010, the Magistrate Judge filed a Report and Recommendation [16] opining that Cotto's petition should be dismissed because of his failure to prosecute the case. This Court adopted the Report and Recommendation on December 27, 2010 [17], noting that no objections to the R&R had been filed.

The following day, Cotto's objections [18] were entered on the docket. Although the objections arrived late to this Court, the envelop accompanying the objections shows that they were submitted in a timely fashion in accordance with the prisoner "mailbox rule." Accordingly, the Court has given the objections full consideration and reconsidered, *de novo*, the Magistrate Judge's December 6, 2010 Report and Recommendation and my own Memorandum Order [17] adopting the R&R. Having done so, this Court finds that the objections lack merit.

Cotto's only argument in his objections is that the Magistrate Judge erred in concluding that he had failed to pay the \$5.00 filing fee. In support of this argument, he has attached a statement from his institutional account showing a payment of \$5.00 to this Court on May 7, 2010 and a \$24.00 payment to the U.S. Marshal Service on June 2, 2010. Unfortunately for Cotto, however, the payments in question relate not to this action but to another action commenced by him at a separate docket number and styled

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² The Magistrate Judge's order actually directed Cotto to do one of two things: pay the \$5.00 filing fee or file a motion to proceed *in forma pauperis* with an accompanying institutional account statement. Given the posture of the case and the denial of Cotto's previous IFP motion, the latter directive was likely the result of an inadvertent oversight.

SPB (W.D. Pa.). Accordingly, Cotto has failed to produce any evidence to contradict the Magistrate Judge's conclusion that he has failed to pay the \$5.00 filing fee relative to this action. Based upon the foregoing, the following order is entered:

AND NOW, *to wit*, this 4th day of January, 2011, having construed the Petitioner's objections [18] as a motion for *de novo* reconsideration of the Magistrate Judge's December 6, 2010 Report and Recommendation [16] and this Court's own Memorandum Order of December 27, 2010 [17],

IT IS ORDERED that the motion for reconsideration is DENIED inasmuch as the Petitioner's objections lack merit and no reason has been presented to the Court that would justify amending its prior order of December 27, 2010. Accordingly, the Court's Order of December 27, 2010 stands as originally issued.

s/ Sean J. McLaughlin

Sean J. McLaughlin
United States District Judge

cc: All parties of record.
U.S. Magistrate Judge Baxter